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No. 935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ATWOOD'S TRANSPORT LINES, INC., *Appellant*

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION, *Respondents*

On Appeal from the United States District Court for the District of Columbia, Sitting as a Statutory Three-Judge Court

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Columbia (sitting as a three-judge court under authority of 28 U.S.C. Secs. 2284 and 2325) dated and entered on November 28, 1962, denying appellant's prayer that certain orders of the Interstate Commerce Commission be enjoined and set aside and dismissing appellant's complaint (Appendix A, *infra*).

OPINIONS BELOW

The court's opinion (including the dissenting opinion of Judge Luther W. Youngdahl) dated November 14, 1962, is reported at 211 F. Supp. 168 (Appendix B, *infra*). The report of the Commission, Division 1 (including the dissenting opinion of Commissioner Charles A. Webb) served July 19, 1961, is reported at 86 M.C.C. 399 (Appendix D, *infra*).

JURISDICTION

This is an action against the United States and the Interstate Commerce Commission brought under 28 U.S.C. Secs. 1336 and 2325, by appellant, a motor carrier engaged in bus transportation between Washington, D. C., and certain points in Maryland, to set aside an order of the Commission which directed appellant to cease and desist from conducting charter bus transportation of passengers from Alexandria and Fort Belvoir, Va., to points and places in the United States.

The judgment appealed from is dated and was entered on November 28, 1962. Appellant filed its notice of appeal on January 15, 1963, in the United States District Court for the District of Columbia. This Court has jurisdiction of this appeal under 28 U.S.C. Sec. 1253. *Burlington Truck Lines, Inc.* v. *U. S.* (Dec. 3, 1962), U.S. , 9 L. ed. 2d 207; *Interstate Commerce Commission* v. *J-T Transport Company,* (1961), 368 U.S. 81; *American Trucking Associations, Inc.* v. *U. S.* (1960), 364 U.S. 1; *Schaffer Transportation Company* v. *U. S.* (1957), 355 U.S. 83.

QUESTIONS PRESENTED

Whether, where Congress has given appellant a right to transport charter parties under rules and regulations to be prescribed by the Commission and where the Commission issued regulations and has interpreted them by such vague criteria as "the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved," the Commission has complied with 49 U.S.C. Sec. 308(c) and has met those standards of definiteness, reasonableness and legality which reviewing courts are competent to impose upon it.

Whether the Commission's Rule III, Ex Parte MC-29, *Regulations Governing Special or Chartered Parties Service*, 29 M.C.C. 25, 48, as construed in determining whether appellant may lawfully originate charter parties at Fort Belvoir and Alexandria, Va., are so vague, indefinite, arbitrary, capricious, lacking in rational basis and illegal as to deprive appellant and more than a thousand interstate motor carriers of passengers similarly situated of property without due process of law contrary to the guarantee of the Fifth Amendment.

Whether the Commission acted arbitrarily in rejecting appellant's timely request for the institution of a rule-making proceeding for the purpose of promulgating pertinent regulations concerning authorized origin territory of charter bus operations by regular route carriers sufficiently clear, unambiguous and certain to permit appellant and others to conduct their charter business with some assurance of legality.

STATUTES AND REGULATIONS INVOLVED

Section 308(c) of 49 U.S.C. (Section 208(c) of the Interstate Commerce Act) provides:

> "Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

The Commission did prescribe such rules and regulations in Ex Parte No. MC-29, *Regulations Governing Special or Chartered Parties Service*, 29 M.C.C. 25, 48 (1941), Rule III, pertinent here, of which provides as follows:

> "Origin Territory—Any common carrier of passengers by motor vehicle subject to these rules may transport special or chartered parties (1) which originate at any point or points on the regular route or routes or at any off-route point or points authorized to be served by such carrier or (2) *which originate at any point or points within the territory served by its regular route or routes.*" (Emphasis supplied).

The formula adopted by the Commission and approved by the majority of the court below in interpreting Rule III of the said regulations in the determination of what points are "within the territory served" is as follows:

> "As above noted, determination of this problem depends upon many different facts, including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved." (App. D, p. 42a *infra*)

STATEMENT OF THE CASE

The facts are not in dispute.

Appellant holds various certificates of public convenience and necessity issued by the Interstate Commerce Commission. As pertinent here, under its certificate No. MC-108452 Sub No. 6 it is authorized and operates in the transportation of passengers and their baggage and express, mail and newspapers in the same vehicle with passengers over regular and clearly specified routes between Washington, D. C., and Point Lookout, Md., and all intermediate points. It also holds authority to transport passengers and their baggage between Washington, D. C., and the site of the United States Atomic Energy Commission near Germantown, Md., serving no intermediate points, over regular and again clearly specified routes.*

Since its incorporation in 1945, appellant has transported charter parties originating at Alexandria, Va., and Fort Belvoir, Va., to various points throughout the United States by motor bus. Its predecessor in interest, Mr. Chester M. Atwood, its present principal stockholder and president, participated in the transportation of charter parties originating at Fort Belvoir in passenger cars and limousines as long ago as 1916.

The shortest highway mileage from the District of Columbia-Virginia boundary line to Fort Belvoir, Va. (via U. S. Highway 1) is 14.5 miles. The shortest highway mileage from the District of Columbia-Virginia boundary line to Alexandria, Va. (via the Mount Vernon Highway) is two miles (Tr. 17).** The Interstate

* Exhibit 2 of record before the Commission.

** Transcript of proceedings before the Commission.

Commerce Commission has determined that both Alexandria and Fort Belvoir are "commercially a part" of the District of Columbia in *Ex Parte No. MC-7, Washington, D. C. Commercial Zone,* 83 M.C.C. 471, 54 M.C.C. 797 and 48 M.C.C. 460.

A competitor of appellant raised the question of the propriety of its originating charter parties at Fort Belvoir, Va., in 1958 and as a result thereof appellant inquired of the Commission whether it could lawfully originate charter parties at that point. By letter dated October 14, 1958, the Commission's then director of the Bureau of Motor Carriers advised appellant that it could lawfully originate charter parties at Fort Belvoir, Va., as an incident to its regular-route operations under Section 208(c) of the Interstate Commerce Act (49 U.S.C. Section 308(c)) inasmuch as Fort Belvoir was within the commercial zone of Washington, D. C. (Appendix B to appellant's brief in the District Court). Appellant as it had in the past continued to originate charter parties at both Fort Belvoir and Alexandria, Va., and continues in such operations currently.

Alexandria, Barcroft and Washington Transit Company, doing business as A. B. & W. Transit Company (intervener-defendant below), filed a complaint with the Commission on June 17, 1959, alleging that appellant was engaged in such charter operations at Fort Belvoir, Va., without possessing appropriate authority issued by the Commission to perform such operations. Appellant admitted that it had transported charter parties from and to Fort Belvoir and that it continued to hold itself out to the public to perform such service contending that under Section 208(c) of the Act (49 U.S.C. Section 308(c)) and the regulations promul-

gated thereunder Fort Belvoir, Va., was "within the territory served" by its regular certificated routes and that such operations were lawful. Hearing on the complaint was held in Washington, D. C., on October 16, 1959, before an examiner of the Commission who served his report on October 7, 1960, together with a recommended order, holding that charter operations by appellant not only from Fort Belvoir, Va., but Alexandria, Va., had been conducted without appropriate authority from the Commission.

Thereafter, appellant filed exceptions to the examiner's report to which A. B. & W. replied and Division 1 of the Commission served its report and order on July 19, 1961. Two of the three members of Division 1 in effect sustained the examiner's report and recommendation while the third commissioner entered a dissenting opinion in which he held that because of the uncertainty arising out of the meaning of the phrase "within the territory served" of Rule III, the Commission should institute an investigation looking toward the promulgation of a more definite rule and defer action in this proceeding during the pendency of the rule making proceeding (Appendix D, pp. 45a-46a, *infra*). Appellant on August 16, 1961, filed a petition for reconsideration of the Division's report and order which was denied by the Commission, Division 1, in an order served January 15, 1962 (Appendix C, *infra*).

By Commission orders served February 14, 1962, and January 23, 1963, it has postponed until further order the effective and compliance date on which appellant must cease and desist conducting the charter operations complained of.

Appellant on February 5, 1962, filed its complaint instituting judicial review of the Commission's orders. It urged that the Commission's actions in determining whether appellant may originate passengers in charter service at Alexandria and Fort Belvoir, Va., were arbitrary, capricious and unlawful and prayed that the orders of the Commission complained of be enjoined, vacated and set aside under 28 U.S.C. Section 1336. The majority of the court below, however, while conceding that rules and regulations of governmental agencies have the force and effect of law and are subject to the same tests as statutes regarding requirements of definiteness and freedom from ambiguity particularly, where, as here, the regulation may be invoked as the basis of a criminal proceeding, held that Rule III and the Commission's interpretation of it in this case were sufficiently clear to apprize those regulated by it as to what was permitted or prohibited. It reasoned that some leeway may be left to the discretion of the courts and administrative agencies in interpreting and enforcing a statute or regulation even if it has a criminal aspect. The majority of the court concluded that the Commission had acted reasonably in promulgating Rule III and that it was not subject to objection on the score of vagueness (Appendix B, p. 6a, *infra*). Judge Youngdahl, however, vigorously dissented (Appendix B, pp. 12a-32a, *infra*). He held that Rule III and the Commission's interpretation of it were indefinite, were arbitrary and were illegal and concluded that the case should have been remanded to the Commission with instructions to grant appellant's request that the Commission institute an industry-wide investigation looking toward the promulgation of a new rule which would satisfy standards of definiteness, reasonableness and legality.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Although Rule III was promulgated by the Commission in 1941, this is the first occasion when it has been subjected to judicial scrutiny. This is not to say, however, that the question of where a certificated regular route motor carrier of passengers may originate charter parties under its incidental rights granted by Congress in Section 208(c) of the Interstate Commerce Act (49 U.S.C. Sec. 308(c)) has been so clear as to avoid litigation. On the contrary, this question both before and after the promulgation of the regulation in question has been before the Commission in a multitude of proceedings. See cases cited in footnotes 5 and 11, Appendix B, pp. 16a and 24a, *infra*, for a partial list of decisions which do not include numerous unreported cases.

The questions presented raise issues of importance not only to appellant but to more than a thousand regular route motor common carriers of passengers subject to the Commission's jurisdiction and Rule III of its *Regulations Governing Special or Chartered Parties Service, supra.* While a carrier's regular routes are spelled out with exact precision as to highways over which it may operate, because of the Commission's failure to issue regulations with sufficient clarity with respect to the territory within which a regular route carrier may originate charter parties, this latter important segment of a motor carrier's business must of necessity be conducted under a constant cloud of uncertainty. As Commissioner Webb stated in his dissenting opinion, (Appendix D, p. 46a, *infra*), "The Commission's duty to remove uncertainty is clear. *Rights conferred by the Congress should not be vitiated by vague and uncertain criteria nor should*

the exercise of those rights be fraught with peril". (Emphasis supplied.)

A statute which is drafted in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally* v. *General Construction Co.* (1926), 269 U.S. 385; *International Harvester Co.* v. *Kentucky* (1914), 234 U.S. 216. Similarly, administrative regulations having the force of statute must meet the same requirements of definiteness and understandability as a statute. *Sentner* v. *Colarelli* (ED Mo. 1956), 145 F. Supp. 569, aff'd. *Per Curium; Barton* v. *Sentner,* 353 U.S. 963. It is pure happenstance that this proceeding was initiated by a complaint filed with the Commission by a competing motor carrier seeking a cease and desist order. The very regulation here under attack may be invoked by the Commission in a criminal proceeding initiated under 49 U.S.C. Sec. 322. Where the federal crime making power is delegated to an administrative agency, this Court is justified in requiring considerable precision in its exercise. *M. Kraus & Bros.* v. *U. S.* (1952), 327 U.S. 614, 621, 622. *Boyce Motor Lines* v. *U. S.* (1952), dissenting opinion, 342 U.S. 337, 343, 344. Clearly, two different standards of required clarity cannot be applied to the same administrative regulation notwithstanding the fact that the added elements of knowledge and willfulness must be present in its penal application.

Rule III and its interpretation by the Commission herein are invalid as being indefinite, arbitrary and illegal. The majority of the court below held that appellant's contention of the invalidity of Rule III and its interpretation was a *non sequitur* in that if the

Commission "fails to prescribe valid rules and regulations, a serious doubt would arise whether any such operation may be conducted." (Appendix B, p. 4a, *infra*). This holding is clearly erroneous as Congress in 49 U.S.C. 308(c) has statutorily granted to appellant and other carriers a *right* to engage in charter operations and this right cannot be destroyed or withheld by Commission failure to promulgate, valid or even no regulations as the statute prescribes. As Judge Youngdahl correctly pointed out; between 1935 when the statute became effective and 1941 when the Rule III was promulgated, a period of time when no regulations were effective, incidental charter operations of the type here in question were conducted (Appendix B, p. 16a, *infra*). The granting of the relief which appellant seeks would not result in the termination of incidental charter service. The Commission would promptly be required to formulate a new rule of sufficient clarity to enable carriers subject to it to understand with at least a modicum of exactness just where they may conduct business.

That Rule III is fatally vague is best illustrated by appellant's own experience with respect to charter operations at Fort Belvoir. In direct response to its inquiry of the Commission as to whether it may lawfully originate charter parties at that point it was specifically told by a responsible official of the Commission that it may do so (See Appendix B to appellant's brief in the court below). Yet, on complaint of a competitor in this proceeding, it is told the contrary. If the Commission itself cannot consistently interpret its own Rule with respect to the same carrier and the same origin point, it is clear that those subject to it have not been properly apprized of the scope of their operating

rights and what they may or may not lawfully do. If it becomes necessary to guess as to the meaning of the Rule and men of common intelligence differ as to its application, then the Rule as construed violates constitutional due process guarantees. *Connally* v. *General Construction Co., supra; International Harvester Co.* v. *Kentucky, supra; M. Kraus & Bros.* v. *U. S., supra.*

The Commission in justification of its refusal to promulgate a more meaningful regulation than Rule III resorted herein to reliance on a number of "factors" or "criteria". It held that:

> "Determination of this problem depends upon many different facts, including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved." 86 M.C.C. at 404; Appendix D, p. 42a, *infra.*

The mere restatement of these "factors" is persuasive argument that they certainly do not constitute a rational basis for the Commission's conclusion (*Mississippi Valley Barge Line Co.* v. *U. S.* (1934), 292 U.S. 282, 286-7), and as Judge Youngdahl stated in his dissent here:

> "It is all well and good to consider each proceeding 'upon its own peculiar circumstances'. But unless the Commission in the course of such consideration is applying some reasonably clear and definite standards—not merely a list of 'factors'—the appeal to 'peculiar circumstances' is merely a facade for completely *ad hoc* and unreasoned decision-making." Appendix B, p. 28a, *infra.*

As indicated, one of the "factors" referred to by the Commission was "the operations of competing carriers and their ability to perform the service involved." Incidental charter rights are conferred by the statute without proof of public convenience and necessity. The very purpose of the statute is defeated to the extent that consideration is given to the operations of competing carriers and their ability to perform the service involved. The question of what points fall "within the territory" served by a carrier's regular routes is an economic and geographic question and not a question involving a need for charter service. Both Judge Youngdahl and Commissioner Webb agree that consideration of this factor is illegal; yet, the majority of the court below did not mention it.

CONCLUSION

Past experience demonstrates that so long as the question of where a regular route motor common carrier of passengers may originate incidental charter parties is determined by Rule III and the Commission's prevailing interpretation of that rule, the question will obviously recur. Appellant and more than a thousand other motor carriers similarly situated are today almost thirty years after Congress vested in them incidental charter rights—because of the Commission's vague, arbitrary and unlawful treatment of this phase of motor transportation, without knowledge of where they may conduct such operations. Appellant and other carriers similarly situated are common carriers and, as such, must hold their services out to the public at large. Because of the large number of persons affected, both the members of the motor bus industry and

the charter bus riding public throughout the country, the issues must be regarded as of general importance.

Respectfully submitted,

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March 15, 1963

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 403-62

ATWOOD'S TRANSPORT LINES, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION

Judgment

This Court having heretofore filed its opinion to the effect that the order of the Interstate Commerce Commission complained of is valid and lawful in all respects,

It is therefore ORDERED, ADJUDGED AND DECREED that the injunction prayed for be, and it is hereby, denied, and that the complaint be, and it is hereby, dismissed.

Dated at Washington, D. C., this 28th day of November, 1962.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
United States Circuit Judge

/s/ Alexander Holtzoff
ALEXANDER HOLTZOFF
United States District Judge

Subject to my dissent
/s/ Luther W. Youngdahl
LUTHER W. YOUNGDAHL
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 403-62

ATWOOD'S TRANSPORT LINES, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

Opinion

Edward G. Villalon, of Washington, D. C., for the plaintiff.

Betty Jo Christian, Attorney, Interstate Commerce Commission, of Washington, D. C., for defendants.

S. Harrison Kahn, of Washington, D. C., for defendant-intervener.

Before WRIGHT, Circuit Judge, and HOLTZOFF and YOUNGDAHL, District Judges.

HOLTZOFF, *District Judge*.

This is an action against the United States and the Interstate Commerce Commission, brought under 28 U.S.C. §§ 1336 and 2325, by the plaintiff Atwood's Transport Lines, Inc., a corporation engaged in bus transportation between Washington, D. C., and certain points in Maryland, to set aside an order of the Interstate Commerce Commission which directed the plaintiff to cease and desist from conducting transportation of passengers from Alexandria and Fort Belvoir, Virginia, to various unspecified points and places in the United States. The facts are not in dispute.

The plaintiff has been operating buses under certificates of public convenience and necessity issued by the Interstate Commerce Commission between Washington, D. C. and Point Lookout, Maryland, and between Washington, D. C. and the site of the United States Atomic Energy Commission near Germantown, Maryland. The plaintiff is also authorized to run buses between Jarboesville, Maryland and Piney Point, Maryland, and to carry passengers in charter operations between Washington, D. C. and Alexandria, Arlington National Cemetery and Mount Vernon, Virginia. In addition, the plaintiff has been transporting passengers in charter operations from Alexandria and Fort Belvoir, Virginia, to various unspecified points and places in the United States. It is the last mentioned activity that is challenged in this action.

The pertinent statutory provision is found in the Interstate Commerce Act, 49 U.S.C. § 308(c), and reads as follows:

> "(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

In 1941 the Interstate Commerce Commission implemented this statutory authority by adopting a series of regulations governing service to special or chartered parties.[1] Rule III of these regulations reads as follows:

> "*Origin territory.* Any common carrier of passengers by motor vehicle subject to these rules may transport special or chartered parties (1) which originate at any point or points on the regular route or routes or at any off-route point or points, authorized to be

[1] 29 M.C.C. 25, 48.

served by such carrier, or (2) which originate at any point or points *within the territory served by its regular route or routes.*"[2]

The present controversy was initiated by a complaint filed before the Interstate Commerce Commission by the Alexandria, Barcroft and Washington Transit Company, which has been permitted to intervene in this action. The complaint charged that charter operations undertaken by the plaintiff, from Fort Belvoir, Virginia, were illegal and unauthorized. The proceeding before the Commission terminated in a final decision that Fort Belvoir and Alexandria charter operations were not within plaintiff's incidental authority. An order was issued directing the plaintiff to cease and desist from these operations. The plaintiff then brought this suit to set aside the order of the Commission and this three-judge court was convened in accordance with the statutory requirement. The facts having been admitted in the pleadings, the matter is before the court as though each side had moved for judgment on the pleadings.

It is contended by the plaintiff that Rule III, quoted above, is invalid as lacking sufficient definiteness in that the phrase, "the territory served by its regular route or routes" is too vague. It is argued that what constitutes such territory may be a matter of opinion. At the outset there is a question whether this line of argument is not a *non sequitur*. If it should be held that the regulations adopted by the Commission to implement 49 U.S.C. § 308 (c) are invalid, the result would be the same as though no regulations had been promulgated. The statute, however, authorizes transportation of special or chartered parties under such rules and regulations as the Commission shall have prescribed. If the Commission fails to prescribe valid rules and regulations, a serious doubt would arise whether any such operation may be conducted. It is not necessary,

[2] Emphasis supplied.

however, to pursue this aspect of the matter. This Court holds that the regulation is valid.

Rules and regulations promulgated by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to the same tests as statutes. It is argued that since a knowing and wilful violation of the statute involved in this action or of any rule and regulation thereunder, is a criminal offense, 49 U.S.C. § 322, the regulation in question is subject to the same requirement of definiteness as a penal statute. While a statute must be sufficiently specific to apprize persons affected by it of its requirements and of the elements constituting any criminal offense, nevertheless, the law does not require the impossible or even the impracticable. Absolute detailed certainty with the precision of a mathematical formula, is not exacted. Some leeway may be left to the discretion of the courts and administrative agencies in interpreting and enforcing a statute or regulation, even if it has a criminal aspect. It is sufficient if members of the public are placed on notice as to what is required or prohibited, and what would be deemed a criminal violation.

In this instance the Commission explained the reasons why the words "the territory served by its regular route or routes" were not limited further. It stated:

> "Any general rule defining the origin territory which will fit the exact conditions peculiar to all carriers operating under varied conditions, involving such factors as density of traffic, ability of competitors to furnish suitable equipment, and proximity of garages to particular origin points, is difficult of formulation. The carriers generally concede that they should be permitted to originate chartered parties within a territory beyond the route or routes actually served in regular service. In defining origin territory, certainly a reasonable flexibility should be permitted in order that

adequate service may be available to communities located in sparsely settled areas such as exist in the western portion of the United States, as compared with available service in the more densely settled areas in the East. While a limitation of origin territory to places within a 10-mile radius of the regular routes appears reasonable in the latter instance, it would be too restrictive in the former."[3]

The Court is of the opinion that the Commission acted reasonably in not defining or restricting the words in question any more precisely or exactly than it did. Consequently the regulation is not subject to objection on the score of vagueness. This conclusion is amply supported by the authorities.

One of the leading cases on this point is *Nash* v. *United States*, 229 U. S. 373, 377, in which the validity of the Sherman Antitrust Act was attacked because of an alleged lack of definiteness in failure to define the phrase, "contracts in restraint of trade". It was argued that since the court had recently construed the Act as being applicable only to such contracts in restraint of trade as prejudiced the public interest, the crime defined by the statute contained an element of degree as to which there might be differences of opinion. This contention was overruled and the constitutionality of the Act was sustained in an opinion written by Mr. Justice Holmes, in which he summarized the applicable principle as follows:

". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

[3] 29 M.C.C. 39.

In *United States* v. *Alford*, 274 U. S. 264, 267, a statute punishing anyone who built a fire in or *near* any forest, or other inflammable material upon the public domain, was upheld as against an objection that the word "near" was too indefinite.

In *United States* v. *Wurzbach*, 280 U. S. 396, 399, the Supreme Court sustained the validity of an Act of Congress punishing any one of certain enumerated Governmental officials, for soliciting or receiving contributions for any political purpose from any other official. The contention that the words "political purpose" were too vague to meet the requirement of definiteness was overruled.

A State statute regulating motor vehicles was involved in *Sproles* v. *Binford*, 286 U. S. 374, 393. Objections on the ground of alleged lack of definiteness were advanced against a provision exempting vehicles from limitations as to height and as to weights of loads, when used only for transportation from point of origin to the nearest practicable common carrier receiving or loading point, or vice versa, "by the shortest practicable route". The court, in an opinion by Mr. Chief Justice Hughes, held that the words "shortest practicable route" were not too vague to be understood. He added:

> "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."

In *Robinson* v. *United States*, 324 U. S. 282, 285-286, the Court, in an opinion by Mr. Justice Black, overruled a contention that the Federal Kidnapping statute was invalid because of alleged uncertainty as to the precise meaning and scope of the word "unharmed" and the phrase "liberated unharmed".

In *United States* v. *Petrillo*, 332 U. S. 1, 7-8, the Court sustained as against an objection that it was too indefinite,

a provision of the Communications Act, which made it a criminal offense to coerce a licensee of a broadcasting station to employ any persons in excess of the number of employees needed to perform actual services. Mr. Justice Black wrote as follows on this point:

> "We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."
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> • • • • • • • • • •
>
> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

In *Communications Assn.* v. *Douds*, 339 U. S. 382, 412, the Court upheld provisions of the Labor Management Relations Act disqualifying any labor union from presenting any petition or complaint to the National Labor Relations Board unless every officer of the organization and every officer of any national or international labor organization of which it was an affiliate or constituent unit, filed an affidavit that he was not a member of the Communist Party or affiliated with it, and was not a member of or supported any organization that believed in or taught the overthrow of the United States Government by force or by any illegal or unconstitutional methods. Knowingly and

wilfully filing a false affidavit was made a criminal offense. The objection that the statute was unconstitutionally vague was overruled by the Supreme Court in an opinion written by Mr. Chief Justice Vinson, who wrote as follows:

> "The argument as to vagueness stresses the breadth of such terms as 'affiliated', 'supports' and 'illegal or unconstitutional methods'. There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.
>
> "The only criminal punishment specified is the application of § 35(a) of the Criminal Code, 18 U.S.C. § 1001, which covers only those false statements made 'knowingly and willfully'. The question in any criminal prosecution involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc. And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable."

The decision in *Boyce Motor Lines v. United States*, 342 U. S. 337, 340, is of particular interest, because, like the instant case, it involved a regulation promulgated by the Interstate Commerce Commission, the validity of which was assailed on the ground of indefiniteness. The regulation required drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas, to avoid "so far as practicable, and,

where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." It was argued that the words, "so far as practicable and where feasible" were so vague and indefinite as to make the standard of guilt conjectural. The Court overruled this contention and held that the provision established a reasonably certain standard of conduct. The validity of the regulation was sustained. The opinion of the Court, written by Mr. Justice Clark, contained the following discussion of this question:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few word possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

In *Roth* v. *United States*, 354 U. S. 476, 491, in an opinion written by Mr. Justice Brennan, the Supreme Court held that the words, "obscene, lewd, lascivious, or filthy or other publication of an indecent character", were sufficiently definite to constitute a proper standard. The Court remarked in the course of its opinion that "lack of precision is not itself offensive to the requirements of due process".

In *McGowan* v. *Maryland*, 366 U. S. 420, 428, the Supreme Court sustained the validity of a State Sunday

closing law. It was claimed that an exemption for retail sales of merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks, etc. in Anne Arundel County, was unconstitutionally vague. This contention was overruled in an opinion written by Mr. Chief Justice Warren.

The foregoing authorities inescapably lead to the conclusion that the phrase contained in the regulation involved in the instant case,—"territory served by its regular route or routes"—, is sufficiently definite and is not vulnerable to the objection that it is too vague. It is of some significance, although not in itself conclusive, that this regulation has been in existence for over twenty years and all counsel agree that its validity has never been challenged. It is quite apparent that the industry has accepted and acquiesced in the regulation and has been living under it.

There remains for consideration the question whether the application of the regulation in the case at bar was in any respect arbitrary or capricious, and whether the decision of the Commission was reasonable on the basis of the facts before it, and is supported by the evidence. The question before the Commission was whether Alexandria and Fort Belvoir, Virginia, were within the territory served by the plaintiff's regular routes. The plaintiff was authorized to serve only specified points situated in Maryland. It had no authorized route in Virginia. The plaintiff's terminal is located at 12th Street and New York Avenue, in the heart of downtown Washington. Its routes proceeded through Maryland and in a southeasterly direction to Point Lookout, and in a northerly or northwesterly direction to the Atomic Energy Commission at Germantown, Maryland. The plaintiff's regular routes did not traverse any section of Virginia. On the other hand, Alexandria and Fort Belvoir are located on the Virginia side of the Potomac River. The Commission found that Alexandria was approximately two miles from the District of Columbia boundary line, while Fort Belvoir was 14.5 to 19.5 miles

from the border, depending upon what route was used. Under the circumstances the record fully justified the conclusion of the Commission that Alexandria and Fort Belvoir, Virginia, may not be considered to be within the territory served by the plaintiff's regular routes.

In *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536, the Court in sustaining an order of the Interstate Commerce Commission observed that the function of the reviewing court was restricted and limited to ascertaining whether there was warrant in the law and the facts for what the Commission had done, and that the court may not substitute its own view concerning what should be done.

In *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286, the Court in upholding an order of the Interstate Commerce Commission stated in an opinion written by Mr. Justice Cordozo:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

Judgment for the defendants.

/s/ J. Skelly Wright
United States Circuit Judge.

/s/ Alexander Holtzoff
United States District Judge.

October 11, 1962.

YOUNGDAHL, J., dissenting:

There are two ways of stating the principle of law which governs the scope of our review. One way, used by the majority in so lightly brushing aside the issues raised on this appeal, is that the judicial function is exhausted when there is found to be a "rational basis" for the regulations, interpretations, and decisions of an administrative agency.[1]

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[1] *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-7 (1934).

The other way, which describes the judicial function more affirmatively, is that this search for a "rational basis" implies that courts have a duty to strike down such regulations, interpretations, and decisions if they are indefinite, arbitrary, or illegal.[2]

The problem arises, however, not in stating the principle but in applying it to this case, particularly because it is conceded that there is no judicial precedent involving the facts presented on this appeal. The disputed issue which those facts raise is whether the Interstate Commerce Commission's regulation concerning the place of origin for certain charter bus operations complies with the mandate of Congress and meets those standards of definiteness, reasonableness, and legality which courts are competent to impose upon administrative agencies. I would hold that the challenged regulation fails to meet those standards and that the Commission has not yet formulated a rule for the place of origin for charter service as required by Congress.

The regulation, dating from 1941, supplements the Motor Carrier Act of 1935. Interstate Commerce Act, Part II, 49 U.S.C. §§ 301-27. That statute established a comprehensive regulatory network within which interstate motor carriers—principally busses and trucks—must operate. As to busses, the statute imposes two main requirements: certificates of public convenience and necessity for specified routes or territories; and approved rates.

In order for bus companies to transport special or chartered parties,[3] as distinct from their regular route service,

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[2] Administrative Procedure Act § 10(e), 5 U.S.C. § 1009.

[3] "The term 'special or chartered party,' as used in these regulations, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destina-

two procedures are available. One is for the bus company to seek a special certificate of public convenience and necessity for particular charter operations which the company expects to operate from time to time. 49 U.S.C. § 307(a). The other procedure—the one involved in the present case—is for the bus company to undertake charter service as an *incident* of its regular route service, as provided in § 308(c):

> Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission *shall have prescribed.* (Emphasis added).

Two observations must be made about this statute. The first is that while the statute says that incidental charter service can have points of *destination* "any place" in the world, the statute is completely silent as to permissible points of *origin*. The second observation is that the statute in using the words "shall have prescribed" *requires* the Commission to issue rules and regulations which will enable bus companies to exercise their statutory right to transport chartered parties as an incident of their regular certificated service.[4] It therefore became the duty of the Commission to clarify by a rule or a regulation the area of permissible points of origin.

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tion or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin. The term 'regular route or routes,' as used in these regulations, means the specific highway or highways over which a motor common carrier of passengers is authorized to operate between fixed termini." *Regulations Governing Special or Chartered Party Service* (Rule II), 29 M.C.C. 25, 47-8 (1941).

[4] The Senate specifically made such rules and regulations mandatory by changing the words "may prescribe" to "shall have prescribed," 79 Cong. Rec. 5664 (April 15, 1935), and in the latter form the bill became law.

This duty the Commission attempted to fulfill in 1941, after briefs and arguments by a number of carriers and carrier associations. The Rules and Regulations as adopted occupy a three-page appendix to an opinion explaining why the Commission adopted these rules rather than some others which had been proposed. *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 47-9 (1941). It is Rule III as there adopted which is at issue in the present case:

> Any common carrier of passengers by motor vehicle subject to these rules may transport special or chartered parties (1) which originate at any point or points on the regular route or routes or at any off-route point or points, authorized to be served by such carrier, or (2) which originate at *any point or points within the territory served by its regular route or routes.* (Emphasis added).

This is the first time that this regulation has been directly challenged in the courts. I dissent from my brethren and would strike down Rule III, and the interpretation of it by the Commission, as indefinite, arbitrary, and illegal.

I

Indefiniteness

The majority opinion states at its outset that "there is a question" whether striking down Rule III on the ground of indefiniteness would not result in a *"non-sequitur,"* because the statute authorizes incidental charter service under rules and regulations, and thus striking down this rule would raise "a serious doubt" whether *any* incidental charter operations by any carrier could be conducted. In other words, the majority in effect declares that without valid rules, there could be no valid charter operations and thus the clear mandate of Congress could be avoided. It seems to me that the *non-sequitur* is in the majority's rea-

soning, for that reasoning is based upon the erroneous assumption that incidental charter rights derive from the rules rather than from the statute. It is true that the statute authorizes incidental charter operations "under such rules and regulations as the Commission shall have prescribed." But that language does not mean that if the Commission were to fail to carry out the clear mandate of Congress, all incidental charter operations would be forced to cease. Such a result would run contrary to past practice under the statute, as well as to the policy which Congress intended § 308(c) to implement.

As to past practice, for six years—from 1935 to 1941—incidental charter operations were carried on by the industry without any general rules or regulations having yet been adopted, even though the Commission in deciding particular controversies about the scope of charter operations recognized that it might later promulgate such rules and regulations.[5] Thus an absence of rules does not mean the termination of charter operations.

As to the policy of Congress, the whole point behind the mandatory language *requiring* the Commission to promulgate rules and regulations was to make clear that the industry's incidental charter rights were *rights*, not subject to industry-wide termination by the Commission. Surely the majority is not suggesting that *if* the Commission were to flaunt the clear duty which Congress imposed—to prescribe rules and regulations governing incidental charter operations—the statute would cut off the very rights which that clear duty was intended to protect. Such an interpretation

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[5] E.g., *Peninsula Transit Corp., Common Carrier Application*, 1 M.C.C. 440, 442-3 (1937); *Norfolk Southern Bus Corp., Common Carrier Application*, 1 M.C.C. 603, 606 (1937); *North Coast Transp. Co., Common Carrier Application*, 2 M.C.C. 67, 69 (1937); *White Horse Pike Bus Co., Inc., Common Carrier Application*, 2 M.C.C. 79, 81 (1937). And see *Regulations Governing Special or Chartered Party Service, supra*, 29 M.C.C. at 39, n. 1.

would penalize the very people whom § 308(c) was designed to benefit: the bus companies and the public. It is always the duty of courts to avoid applying statutory language in a manner which negates the rational purpose of Congress.

If this Court were to strike down Rule III on the ground of indefiniteness, no incidental charter service would have to terminate. Instead, the Commission would promptly be required to formulate a new rule, and any controversies arising in the interim would be held in abeyance pending the promulgation of that new rule. Such a result is in no way a *non-sequitur;* indeed, it is the only result consistent with the judicial function of overseeing administrative agencies in general, and the Interstate Commerce Commission in particular. 28 U.S.C. §§ 1336, 2325.

On the merits, the majority opinion dismisses the defendant's argument that Rule III is so vague and uncertain as to be unlawful, by citing a list of cases in which various phrases in other statutes and regulations have been held to be sufficiently definite. General language from cases (cited in the majority opinion) involving the federal kidnaping statute, the Communications Act, the Labor Management Relations Act, obscenity statutes, Sunday closing laws, or even statutes and regulations dealing with motor vehicles, have no relevance at all to the particular language of Rule III. Such a list of "authorities" is not helpful in resolving the issue presented here, and does not "inescapably lead to the conclusion" that the disputed phrase "is not vulnerable to the objection that it is too vague." (Majority opinion, p. 11). An opposing list of "authorities" could be cited, in which other phrases have been held void for vagueness, but they likewise would be of no assistance in evaluating the particular regulation challenged in this case. The task of deciding whether disputed language is, or is not, so indefinite as to be unlawful is always to be performed by a close examination of particular words in a particular context—and never by a list of some other words in some other contexts.

The facts of the present case supply the proper context for a judicial treatment of the particular language of Rule III. These facts vividly illustrate the state of complete uncertainty in which bus companies are left when they try to comply with Rule III's vague language.

Atwood's Transport Lines, Inc., has regular route certificates to operate on a line which cuts roughly diagonally through the center of Washington, D. C., from the southeast to the northwest. In the southeasterly direction, the lines run for many miles into Maryland down to Point Lookout on Chesapeake Bay and Piney Point on the Potomac. In the northwesterly direction, the lines run for many miles into Maryland to Germantown. As part of its incidental charter operations, Atwood's since its incorporation in 1945 has transported charter parties originating at Alexandria and Fort Belvoir, both across the Potomac in Virginia. (Atwood's predecessor-in-interest conducted charter service by limousine and passenger cars from Fort Belvoir as long ago as 1916.) Alexandria is two miles, and Fort Belvoir is 14.5 miles, from the nearest boundary line of the District of Columbia, which—as noted above—is within Atwood's certificated routes.*

A competitor of Atwood's (presumably the Alexandria, Barcroft and Washington Transit Co., the defendant-intervenor in the present case) questioned Atwood's serving Fort Belvoir, and in October, 1958, Atwood's itself inquired directly from the Interstate Commerce Commission whether

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* We may take judicial notice of the fact that the Woodrow Wilson Memorial Bridge connecting Maryland with Virginia at Alexandria was opened on December 28, 1961, five months after the Commission made its decision in this case, and that by using that bridge, Alexandria and Fort Belvoir would be nearer to Atwood's certificated routes in southeast Maryland than they are to the certificated route through the District of Columbia itself. Thus technology has already substantially changed the "territory served" by Atwood's "regular route or routes"—a fact which points up the complete uncertainty of Rule III.

it was lawful to originate charter parties from Fort Belvoir, "since it is believed to be within the metropolitan area of Washington, D. C." (Letter from Atwood's to the director of the Commission's Bureau of Operating Rights, October 7, 1958.) The director of the Commission's Bureau of Operating Rights replied: "The Commission has not generally defined the extent of the 'territory served' by a carrier's regular route or routes, * * * there being many factors which may enter into the situation at a given point." (Letter, October 14, 1958.) His advice, however, was that Atwood's could lawfully originate charter operations from Fort Belvoir. Of course, this reply was an "informal opinion," not binding in any way, but the fact that even the director of the Commission's Bureau of Operating Rights could not tell how the Commission might apply its own Rule III is persuasive of Rule III's indefiniteness. Thereafter, in June, 1959, the competitor, A.B.&W., filed a formal complaint before the Commission charging that Atwood's was unlawfully originating charter parties at Fort Belvoir. After findings by an Examiner in 1960, the Commission, in July, 1961, agreed with A.B.&W. and ordered Atwood's to cease and desist from originating charter parties at Fort Belvoir and Alexandria. The execution of that order was stayed pending the outcome of Atwood's direct appeal to this Court.

In this context, the issue for this Court is to decide whether the language of Rule III is definite enough fairly to subject one bus company to an attack by another—and to the prolonged litigation which has followed therefrom—on the ground that two Virginia suburbs of Washington, D. C., the one two and the other 14.9 miles from metropolitan D. C., are not within the "territory served" by regular routes which pass through D. C. from Maryland. The issue is not to evaluate the arguments which those two bus companies advanced before the Commission, but rather to decide whether the language of Rule III, which those argu-

ments assumed to be the controlling law, is itself valid. I would hold that language to be insufficiently definite.

It is not difficult to discover where the Commission found the language contained in Rule III. Section 308(a) of the statute provides that the scope of regular certificated operations may be defined in two ways, the first by *routes* on a map (routes, fixed termini, and intermediate and off-route points), and the second by *area* ("in case of operations not over specified routes or between fixed termini, the *territory within which*, the motor carrier is authorized to operate").[7] When it came to the task of specifying permissible points of origin for incidental charter operations, the Commission realized that those points of origin had to extend beyond the particular *routes* specified in the certificate, because charter parties often have to be picked up at points not on existing routes at all. Indeed, the essence of charter operations is individualized service—one ingredient of which is frequently door-to-door service.[8] On the other hand, there had to be some limitation placed upon the extent to which bus companies could go outside of their certificated routes if incidental charter operations were to remain *incidental*. And so, in Rule III, the Commission went back to the statute itself, found those words dealing with *routes*

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[7] "Any certificate issued under section 306 or 307 of this title shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate • • •." 49 U.S.C. § 308(a).

[8] "Carriers engaged in the transportation of special or chartered parties • • • perform a specialized service, and section 208(c) [49 U.S.C. § 308(c)] as construed by us does not require that origin territory of that service need be limited strictly to the points and places which regular-route carriers are specifically authorized to serve." *Regulations Governing Special or Chartered Party Service, supra*, 29 M.C.C. at 39.

and those words dealing with *area*, and blended them into a statement that incidental charter service could originate "at any point or points within the territory served by its regular route or routes."

Obviously, the reference to *territory* in the statutory specifications for certificates ("the territory within which") had a definite meaning, because individual certificates of public convenience and necessity would delineate with precision the area that could be served. But the reference to *territory* in the regulation dealing with incidental charter service, ("within the territory served") leaves *completely at large* the crucial question of how far from their certificated routes bus companies may stray to pick up charter parties.

In the language of Rule III, what "territory" is "served" by a bus company's "regular route or routes"? The words would seem to require each bus company to determine all of the places—homes, businesses, stores, restaurants, theatres, etc.—which all of its passengers come form, or go to. Yet such a determination has never been even remotely suggested by the Interstate Commerce Commission, presumably because to require it would create an unbearable economic burden upon bus companies, which might choose simply to eliminate incidental charter operations. But without such a determination, anyone trying to apply the language of Rule III is left with nothing but a restatement of the original problem: that bus companies may stray from their certificated lines for some undetermined distance into some undefined area to pick up charter parties. The scope of these distances and areas is precisely the question which the statute left unclear and which the Commission was therefore required to answer by appropriate rules or regulations. In effect, the "rule" dealing with points of origin is thus no rule at all, because it is so general and indefinite as to provide no guide in concrete situations.

The issue for the Court is not, as the majority opinion suggests, to determine whether there was a rational basis for leaving Rule III in this indefinite state. (Majority opinion, pp. 5-6, 12-13.) If that were the judicial test, one might agree with the Commission that a "general rule defining the origin territory which will fit the exact conditions peculiar to all carriers operating under varied conditions * * * is difficult of formulation." *Regulations Governing Special or Chartered Party Service, supra,* 29 M.C.C. at 25. In this sense, there might well be a "rational basis" for leaving the question completely at large. But Congress has determined otherwise. The fact that a general rule, even a fairly detailed one, may be "difficult of formulation" does not mean that the Commission does not have to try. Indeed, the concluding quotation in the majority's opinion states the proper, more precise test: "The judicial function is exhausted when there is found to be a rational basis for *the conclusions approved* by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-7 (1934) (Cardozo, J.) (emphasis added). The test is whether there is a rational basis for *the conclusions approved*—the approved Rule III; not whether there is a rational basis for coming to no conclusion at all. Of course courts may not substitute their judgment for the judgment of the Commission; but when the Commission has not exercised its judgment except to decide *not* to decide, then courts have a duty to say so.*

There is no rational basis for Rule III. It simply restates the question, makes no attempt to answer it, thereby fails to comply with the mandate of Congress, and results in leaving bus companies in a state of complete uncer-

* In the *Mississippi Valley Barge Line* case, it is significant that Mr. Justice Cardozo stated, in the sentence immediately following the one quoted in the majority opinion: "In this instance, the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader * * *." 292 U.S. at 287. In the present case, the "appointed task" was not fulfilled at all.

tainty. Bus companies have a right to have this state of uncertainty corrected, for three important reasons which go beyond the particular controversy now before us.

First, the serious nature of possible sanctions for a violation of Rule III requires this Court to insist upon definiteness. Section 312(a) provides for the suspension, change, or revocation of a carrier's certificate for "willful failure to comply with any * * * lawful order, rule, or regulation * * *." Section 322(a) provides for a $500 fine (plus $200 to $500 per day for as long as the violation continues) for anyone "knowingly and willfully violating * * * any rule, regulation, requirement or order * * *." Exactly what might constitute a "willful" violation of Rule III is not clear, but because of the flexible meanings of "willfulness," this Court should be particularly concerned about the indefiniteness of Rule III. This the majority opinion concedes when it says that a regulation must be "sufficiently specific to apprize persons affected by it of its requirements and of the elements constituting any criminal offense." (pp. 4-5). Rule III is not thus "sufficiently specific."

Second, regulations of the Commission should be sufficiently definite to enable carriers to plan intelligently and efficiently for the requirements of their businesses. Common carriers are clothed with the interests of both the public and themselves, and both interests are best served when carriers know with reasonable certainty how large a fleet of busses may be needed. There is always an element of uncertainty in such predictions, but the uncertainty should not be compounded by the risks of an adverse Commission decision on the proper scope of the vague language of Rule III.[10] In providing for mandatory rules and reg-

[10] On precisely this general point, Judge Friendly of the Second Circuit has written that a main reason "for definite standards of administrative adjudication is the social value in encouraging the security of transactions * * *. A trucker contemplating the pur-

ulations, the Congress contemplated that carriers could expect reasonably clear standards to use in predicting their economic needs, and these standards Rule III fails to provide.

Third, the large amount of litigation over the scope of Rule III emphasizes the harm which stems directly from the vagueness of that rule. The majority of this Court declares that it is "of some significance" that Rule III "has been in existence for over twenty years and * * * that its validity has never been challenged. It is quite apparent that the industry has accepted and acquiesced in the regulation and has been living under it." This statement is accurate only if we were to assume that a failure to bring the matter to the attention of the courts indicates acceptance and acquiescence. That such an assumption is erroneous is indicated by the number of challenges in the Commission itself. In addition to the published decisions concerning the scope of Rule III,[11] we do not know how many unpublished decisions and informal opinions have had to be rendered by the Commission. At least one un-

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chase of a new fleet should know the degree to which he will or will not be protected from rate-cutting by other truckers or by competing modes of transportation. Even a disappointing answer to such questions is better than none." Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 878-9 (1962).

[11] e.g., *Mohawk Coach Lines, Inc.* v. *Hudson Transit Lines, Inc.*, Docket No. M.C.-C.-2605, —M.C.C.— (served June 8, 1962); *The Blue Line, Inc.* v. *The Short Line of Connecticut, Inc.*, 88 M.C.C. 201 (1961); *Somerset Bus Co., Inc.* v. *Suburban Transit Corp.*, 88 M.C.C. 13 (1961); *Hudson Transit Lines, Inc., Extension—Long Island, N.Y.*, 76 M.C.C. 215 (1958); *Starr Transit Co., Inc., Interpretation of Charter Authority*, 74 M.C.C. 773 (1958); *Lewis—Interpretation of Charter Authority*, 73 M.C.C. 447 (1957); Kirschbaum, Extension of Charter Operations, 52 M.C.C. 670 (1951); *Public Service Interstate Trans. Co., Common Carrier Application*, 42 M.C.C. 277 (1943); *Indiana Motor Bus Co., Extension of Operations—Charter Parties*, 41 M.C.C. 577 (1942).

published decision and one informal opinion have involved Atwood's itself, so the number involving *all* carriers is not small. The entire motor carrier industry deserves more than controversy and confusion over the scope of what really amounts to no rule at all. As Commissioner Webb in this very case declared in dissent:

> The Commission's regulation is unknowable and its enforcement is necessarily random if the key phrase, "within the territory", is not defined with a modicum of precision. • • • It is impossible for any motor bus operator to know with reasonable certainty the "territory" beyond specifically authorized points of service from which charter parties may be originated. • • • The Commission's duty to remove uncertainty is clear. Rights conferred by the Congress should not be vitiated by vague and uncertain criteria nor should the exercise of those rights be fraught with peril. *Alexandria, Barcroft and Washington Transit Co.* v. *Atwood's Transp. Lines, Inc.*, 86 M.C.C. 399, 406-7 (1961) (dissenting opinion).

With this statement I agree.

II

Arbitrariness

The majority opinion expressed satisfaction with the reasons given by the Commission for failing to specify further the meaning of Rule III, and apparently approved a case-by-case approach in which the Commission would continue to apply to particular charter controversies a list of "factors." Although I agree that in many instances a case-by-case approach is proper, it seems improper to me to "decide" these cases by a list of "factors," rather than under a definite rule. Even assuming *arguendo* that "factors" set forth in Commission opinions may be considered as if they were a part of the regulation itself, a considera-

tion of the "factors' listed by the Commission does not provide a reasoned basis for Commission conclusions. Such an approach leaves reviewing courts completely in the dark in trying to evaluate—as it is our duty to evaluate—the reasonableness or unreasonableness of a particular conclusion.

The Commission has been listing "factors" to be considered in deciding the scope of the phrase "within the territory served" since 1941, when such "factors" as "density of traffic, ability of competitors to furnish suitable equipment, and proximity of garages to particular origin points," were listed as relevant. 29 M.C.C. at 39. In the present case, the Commission declared that "determination of this problem depends upon many different facts, including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved." 86 M.C.C. at 404.

Aside from the operations of competitors, which will be discussed below in Part III, I fail to understand how the other "facts" or "factors" are helpful. In what particular ways are the "proximity of highways" or "the terrain" relevant? Simply to list them does not assist either courts or carriers in evaluating the proper scope of the words. And what "the practical administration of the service" and "the individual circumstances" add to anyone's understanding is completely unclear.

Because these "factors" are unclear, it is virtually impossible to evaluate their application by the Commission in the present case. The two-member majority of the Commission wrote:

> Defendant presently performs very limited operations over only two regular routes, and those routes move in directly opposite directions from its terminal in Wash-

ington, with the one to the southeast through Maryland to Point Lookout, and the other to the northwest to Germantown. At no time do either of the routes approach any closer to Fort Belvoir than at the carrier's terminal in Washington. It is obvious then, that the military reservation under consideration is some 20 miles directly off any point on defendant's regular routes, and, in view of the direction of the carrier's routes, the traffic at Fort Belvoir *would have no relation whatever to the service performed by the carrier over its regular routes. There would appear to be no mutuality whatever* between the traffic which would be served in charter operations from Fort Belvoir and the traffic which is served every day by defendant over its regular routes. Also, it is clear that defendant is of course required to traverse territory directly away from its regular routes for some 20 miles to Fort Belvoir in order to originate the traffic here under consideration. In addition to the lack of mutuality between the traffic being served by the pertinent regular-route service and that proposed to be served in the claimed incidental charter territory, the boundaries and the occupancy of the terrain, including the distinction between Washington and its suburban appendages are especially important here in view of defendant's limited operations. Defendant's regular-route operations have no connection with Virginia, and, consequently, with Washington's suburban appendages in Virginia. * * * In reaching this conclusion, we have recognized * * * that a number of well established motor passenger carriers serve Washington, some of which operate over U.S. Highway 1 which passes directly through the military reservation at Fort Belvoir. In view of these circumstances, we are unable to conclude that Fort Belvoir may be properly considered to be a point "within the territory" served by defendant's regular routes so as to enable the transportation

> of charter parties under section 208(c) [49 U.S.C. § 308(c)] of the act. All that has been said above with respect to Fort Belvoir, *with the exception of distance from defendant's terminal and the character of traffic involved at that point*, applies equally to Alexandria. 86 M.C.C. at 405-6. (Emphasis added).

I have set this passage forth at some length because it constitutes the crucial bit of "reasoning" in the Commission's opinion. Aside from the reference to competitors, which will be considered below in Part III, it seems to me that the Commission has merely restated the facts about distance, direction, the Virginia-Maryland boundary, and "the distinction between Washington and its suburban appendages." All of this merely restates the question; it does not provide an answer. The only hint of an answer occurs in the discussion of "mutuality of traffic," but since there had been no findings of fact on traffic patterns, the Commission on this point was forced to speak conjecturally: "*It is obvious then*, that * * * the traffic at Fort Belvoir *would have* no relation whatever to the service performed by the carrier over its regular routes. There *would appear to be* no mutuality whatever * * *." Not only is this crucial bit of reasoning completely unsupported, but the Commission itself, in the last sentence in the passage quoted above, admits that it does not apply to Alexandria at all. Thus the entire passage seems no more than a collection of empty words.

In this case, the Commission reaffirmed its conclusion that "the best method of dealing with this particular problem was to consider each proceeding upon its own peculiar circumstances." 86 M.C.C. at 403. It is all well and good to consider each proceeding "upon its own peculiar circumstances." But unless the Commission in the course of such consideration is applying some reasonably clear and definite *standards*—not merely a list of "factors"—the appeal to "peculiar circumstances" is merely a facade for

completely *ad hoc* and unreasoned decision-making. The Commission declared that it had "consistently recognized that no rigid standard can be established by which to determine precisely the territory from which a carrier possessing incidental charter rights could originate charter parties." 86 M.C.C. at 404-5. It seems to me that the only consistency the Commission can properly claim is to have recognized no standards at all. Another word for that kind of consistency is arbitrariness.

III

Illegality

One of the "factors" mentioned by the Commission as relevant to determining the scope of the phrase "within the territory served" was the availability of competing bus companies which could perform the same charter service. It is contrary to the plain language of the statute for the Commission to consider competitors at all.

Section 308(c) provides for an incidental charter right which arises automatically from the bus company's certificate of convenience and necessity. The nature and quality of existing service is of course highly relevant to the initial grant of a certificate of convenience and necessity. But once granted, that certificate automatically provides for the right to originate charter parties.[12] The existence,

[12] "The Commission takes the position that chartering privileges are incidental to a grant of regular route authority under Section 207(a) [49 U.S.C. § 307(a)] and arise automatically under Section 208(c) [49 U.S.C. § 308(c)] of the Interstate Commerce Act • • •. [A]s early as 1937, Section 208(c) was interpreted to be a mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges. *Peninsula Transit Corporation Common Carrier Application*, 1 M.C.C. 440, 442 (1937). In the 1941 *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 46, the Commission reaffirmed that "Section 208(c) • • • confers an additional right, *without proof, and which is not severable*, to carriers operating over

nature, or quality of competitors' equipment or service cannot again be considered. Even the disputed Rule III itself, however unclear it is in other respects, is clear in establishing a solely geographical test in the words "within the territory served." Thus it was completely illegal for the Commission to consider at all the fact that some "well established motor passenger carriers" operate over U. S. Highway Number 1, which passes directly through the military reservation at Fort Belvoir. 86 M.C.C. at 406. The operations of these "well established" competitors are completely irrelevant.

Once again, I agree with dissenting Commissioner Webb, who declared in this case:

> One criterion employed by the majority is not authorized by the statute. Incidental charter rights are conferred by section 208(c) [49 U.S.C. § 308(c)] without proof of public convenience and necessity. That statutory purpose is defeated to the extent that consideration is given to "the operations of competing carriers and their ability to perform the service involved." The question of what points fall "within the territory" served by a carrier's regular routes is an economic and geographic question and not a question involving a need for charter service. 86 M.C.C. at 407.

I cannot understand why the majority of the Commission and the majority of this court fail to discuss this issue at all.

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a regular route or routes and between fixed termini • • •." (Emphasis added). The Commission also adhered to this interpretation in the *Baltimore & A.R.R. Extension—Fort George G. Meade*, 63 M.C.C. 357, 366 (1954), as well as in the present case. Thus, for close to a quarter century, the Commission had consistently interpreted Section 208(c) as a mandatory provision. This interpretation, the parties inform us, has been made known to the Congress. We are satisfied that the Commission's interpretation is a reasonable one within the scope of the power and discretion conferred by the governing statute." *Safeway Trails, Inc. v. Interstate Commerce Commission*, 176 F. Supp. 201, 204-5 (1959).

For the relevance or irrelevance of competitors goes to the heart of the statutory scheme concerning incidental charter rights. One of the fears of Congress in enacting the entire Motor Carrier Act was that by regulating the industry, competition would be stifled.[13]

One of the areas in which Congress must have intended competition to be preserved was that of efficient, speedy, and individualized charter service. For the Commission to deny incidental charter rights to Atwood's partly on the ground that other bus companies operate over U. S. Highway No. 1 seems to me to be completely at odds with the policy of Congress, with the statute, and even with the disputed language of Rule III itself.

* * * * * * * * * * *

Of course no court can force an administrative agency to achieve an impossible mathematical certainty, but it seems to me that it is possible in the case of Rule III to establish a reasonably definite rule which would consider geographical situations and differences between urban and rural communities and even then recognize a need for interpretation in certain cases. The Commission might consider, for example, a 25-mile limitation for some areas of the country, and a 100-mile limitation for others. Simply because a 10-mile limitation was rejected by the Commission as impractical over twenty years ago does not mean that some other geographical formula could not now be devised which would be reasonably definite. In any event, the present method for dealing with the scope of permis-

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[13] Note, for example, the following remarks of Representative Sadowski, who piloted the bill through the House: "It has been suggested that the granting of certificates of convenience and necessity may cause monopoly. There seems to be no basis for this contention. There is nothing in the bill to prohibit the Commission from granting two or more certificates over the same route, and there are many operators competing on the same routes now. * * *." 79th Cong. Record 12206 (July 31, 1935).

sible points of origin for incidental charter service is illegal, arbitrary, and so indefinite as to have no rational basis. I am not indicating that Atwood's is entitled to originate the particular charter operations at issue here, but I am merely stating that it is entitled to have that issue determined under a definite rule which Congress required the Interstate Commerce Commission to formulate.

I would thus return the case to the Interstate Commerce Commission with instructions to grant the timely request which Atwood's itself made before the Commission: that the Commission institute an industry-wide investigation looking toward the promulgation of a new rule which will satisfy standards of definiteness, reasonableness, and legality.

APPENDIX C

SERVICE DATE
JANUARY 15, 1962

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of December, A.D. 1961.

No. MC-C-2618
ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY

v.

ATWOOD'S TRANSPORT LINES, INC.

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Atwood's Transport Lines, Inc., defendant, filed August 16, 1961, for reconsideration;

(2) Reply by Alexandria, Barcroft and Washington Transit Company, complainant, filed September 7, 1961;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

It is further ordered, That the order of July 11, 1961, in this proceeding as postponed pursuant to section 17(8) of the Interstate Commerce Act, be and it is hereby reinstated, and the statutory, effective and compliance date is fixed as February 19, 1962.

By the Commission.

HAROLD D. McCOY,
Secretary

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Date of Service
Jul 19, 1961

No. MC-C-2618

ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY

v.

ATWOOD'S TRANSPORT LINES, INC.

Decided July 11, 1961

Upon complaint, defendant found to be and to have been conducting charter operations from Alexandria and Fort Belvoir, Va., as a common carrier by motor vehicle of passengers, in violation of the provisions of the Interstate Commerce Act. Cease and desist order entered.

S. Harrison Kahn and *K. William O'Connor* for complainant.

Glenn F. Morgan, James E. Wilson, and *Edward G. Villalon* for Defendant.

Report of the Commission

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by defendant, and complainant replied.

By complaint filed June 17, 1959, Alexandria, Barcroft and Washington Transit Company, a corporation, doing business as A. B. & W. Transit Company, of Alexandria, Va., a common carrier by motor vehicle of passengers,

alleges that Atwood's Transport Lines, Inc., of Washington, D. C., a common carrier by motor vehicle of passengers, has entered into an agreement or arrangement with the United States Government or its agencies to provide transportation of persons in special or chartered parties, for compensation, in interstate commerce, from Fort Belvoir, Va., to various points and places in the United States and return; that since about January 1, 1959, it has transported passengers in charter service from Fort Belvoir, to points in the United States, and continues to hold itself out to provide such transportation, without possessing either a certificate or permit to perform such operations, in violation of sections 207 and 209 of Part II of the Interstate Commerce Act, and in destructive competition with complainant's operations. Defendant admits that it has transported chartered parties from and to Fort Belvoir, since January 1, 1959, and that it is holding out to perform such service; but denies that the said operations and holding out are without authority from the Commission.

The examiner found that operations by defendant in the transportation of passengers from Alexandria [1] and Fort Belvoir, in charter service, to points in the United States, is not authorized as an incidental right, under section 208 (c) of the act, to defendant's authority to perform operations under its certificates No. MC-108452 and Sub-Nos. 6 and 7 thereunder; that said operations are and have been in violation of the provisions of the act, and unlawful; that an order should be entered requiring defendant to cease and desist, and to thereafter refrain and abstain from such operations unless and until appropriate authority therefor has been obtained; and that the proceeding should be discontinued. On exceptions defendant contends that the examiner erred (1) in finding that Fort Belvoir and

[1] While the complaint did not refer to service to or from Alexandria, the point was introduced in evidence at the hearing and duly considered by the examiner.

Alexandria are not within the territory served by its regular routes, and (2) in failing to find that at least any point within the Washington Commercial Zone is within the territory served by it. It requests the following findings: that it is providing an authorized regular-route service in the transportation of passengers partly within and partly without The Washington Commercial Zone which is a terminus of its regular routes; that under the provisions of Section 208(c) of the act, a regular-route motor carrier of passengers operating partly within and partly without the commercial zone of a municipality may originate special or chartered parties at any point or points within the commercial zone of such municipalities, except the New York, N. Y., Commercial Zone; that Fort Belvoir and Alexandria are within the Washington Commercial Zone and are within the territory served by its regular routes, within the meaning of Rule III in *Regulations, Special or Chartered Party Service,* 29 M.C.C. 25, hereinafter called the *Regulations* case, and that it may transport, in interstate or foreign commerce, to any place special or chartered parties originating at those two points. It argues that the question of which points fall within the territory served by a carrier's regular routes is a factual and geographic question and the availability or non-availability of other motor carriers services should play no part in the determination of the scope of the origin territory where a carrier may originate incidental charter traffic; that the burden should not be placed on every motor carrier of passengers over regular routes to determine the availability of competing carriers' services in order to determine its own territorial scope for charter operations; and that the traffic manager of a motor bus carrier is not aided upon inquiring as to whether the carrier can lawfully originate a charter party at a given point to be advised that the answer depends upon many different facts including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, and the

operations of competing carriers and other carriers' ability to perform the service involved. Defendant maintains that regulation by highly legalistic jargon based upon vague and uncertain criteria is no regulation at all. It requests oral argument before Division 1 in support of its requested findings, or in the alternative, it requests the Commission to institute an investigation looking toward the promulgation of a rule along the lines of its requested findings insofar as those findings would have general application among motor carriers of passengers. As a part of the alternate relief, defendant urges that Division 1 defer action in this proceeding until such investigation of general application is decided. In reply complainant avers that defendant's exceptions are without merit and should be overruled, and that the examiner's report and recommended order should be affirmed. It argues that the following facts are important—Fort Belvoir and Alexandria lie in a direction diametrically opposite from the direction of defendant's regular routes; they are separated from Washington by the Potomac River; while Washington is the dominant business and industrial area, and the center of a large contiguous area, Fort Belvoir and Alexandria are distinct points economically self-sufficient, and independent; numerous existing carriers offer service from these Virginia points; that where, as here, defendant is only authorized to serve points lying outside Washington in Maryland, and has no regular-route authority in Virginia, it is impossible to conclude that special or charter parties service in Virginia is incidental to such routes; that the Washington Commercial Zone is not a factor to be considered in determining the territory to be served; and that there is no necessity for oral argument since the matter has been thoroughly briefed.

Defendant holds authority, other than charter and special operations not here pertinent, to transport (a) passengers and their baggage, and express, mail, and newspapers in the same vehicle with passengers, over regular

routes, between Washington, and Point Lookout, Md., and all intermediate points, from Washington over city streets to the District of Columbia-Maryland State line, and thence over Maryland Highways 5 and 235 to Point Lookout; and return also between Jarboesville, Md., and Piney Point, Md., and all intermediate points, from Jarboesville over Maryland Highway 246 to Great Mills, Md., thence over Maryland Highway 5 to junction Maryland Highway 249, and thence over Maryland Highway 249 to Piney Point, and return, and (b) passengers and their baggage between Washington over city streets to the District of Columbia-Maryland State line, thence over U. S. Highway 240 to junction Maryland Highway 118, and thence over Maryland Highway 118 to the site of the Atomic Energy Commission, and return. Defendant's terminal is located at 12th Street and New York Avenue N.W. in Washington. Its routes proceed through Maryland, in a southeasterly direction in the service to Point Lookout, and in a northerly or northwesterly direction in the operation to the Atomic Energy Commission. Defendant's regular routes do not traverse any section of Virginia. The considered charter service is performed by defendant from Alexandria and Fort Belvoir. Alexandria is approximately 2 miles from the District of Columbia boundary line, and Fort Belvoir from 14.5 to 19.5 miles from the said boundary line, depending upon which of three possible routes is used.

The evidence adduced, the examiner's recommendations, the exceptions, and the reply thereto have been considered. We find that the statement of facts in the examiner's report is accurate in all material respects; and we adopt such statement as our own. The parties fully agree as to the facts in this proceeding. Defendant admits performance of the operations in question, contending that it is authorized to perform such service under section 208(c) of the act. Defendant reasons that, though it may not be authorized to serve points in the commercial zone of or a given terminal area around Washington, in the absence of a

determinative decision to the contrary the area described or defined as a terminal area should afford something of a criterion for interpretation of the words "within the territory" as applied to its regular-route service.

Section 208(c) of the act provides that:

> Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

Such rules and regulations were prescribed in the *Regulations, supra*, and Rule III therein provides that:

> Origin territory.—Any common carrier of passengers by motor vehicle subject to these rules may transport special or chartered parties (1) which originate at any point or points on the regular route or routes or at any off-route point or points authorized to be served by such carrier, or (2) which originate at any point or points *within the territory served by its regular route or routes.* (Emphasis supplied)

The single problem is whether or not Alexandria and Fort Belvoir can be considered to be "within the territory" served by defendant's regular routes.

The Commission has never defined the specific confines of the "territory" served by motor carriers of passengers which could be made applicable in all instances. In the *Regulations case, supra*, a limitation of 10 miles from any regular route of the carrier was rejected as unworkable, and it was observed in this connection that:

> Any general rule defining the origin territory which will fit the exact conditions peculiar to all carriers operating under varied conditions, involving such fac-

> tors as density of traffic, ability of competitors to furnish suitable equipment, and proximity of garages to particular origin points, is difficult of formulation . . . . In defining origin territory certainly a reasonable flexibility should be permitted in order that adequate service may be available to communities located in sparsely settled areas such as exist in the western portion of the United States as compared with available service in the more densely settled areas in the East.

Thus the Commission concluded that the best method of dealing with this particular problem was to consider each proceeding upon its own peculiar circumstances. This conclusion was reaffirmed in *Kirschbaum Extension—Charter Operations*, 52 M.C.C. 670.

A number of proceedings have involved charter service in the western and midwestern parts of the United States or in the more sparsely settled areas. Because of the factors found to exist in these areas, the carriers were permitted to serve rather extensive areas under their incidental charter rights. However, the factors controlling there are not present here, and more important here are the proceedings involving more densely settled areas in the East. In *Starr Transit Co., Inc., Interpretation, Charter Authority*, 74 M.C.C. 773, Division 1 concluded that applicant therein, authorized to perform service between Levittown, Pa., and Wrightstown, N. J., serving no intermediate points, over regular routes which passed within 5 miles of Philadelphia, Pa., was not authorized to serve Philadelphia as a point "within the territory" served by its regular routes. It reasoned that applicant maintained no equipment in Philadelphia, and that, on the other hand, 18 motor carriers of passengers served the city and performed charter operations from that point, and that they all maintain garages, ticket offices, terminal facilities, and equipment there. In conclusion it stated that:

> Where a carrier has authority to serve, as a terminal point on a single route, a city of 60,000 people, located in a densely populated area, we do not believe that another city with a population of over 2 million can be said to be included within that carrier's service territory even though the 2 cities are only 5 or 10 miles apart. It is our conclusion therefore, that Starr's certificate does not authorize it to originate charter parties at Philadelphia.

In *Hudson Transit Lines, Inc., Extension—Long Island, N. Y.*, 76 M.C.C. 215, which involved the applications of several carriers for authority to serve points in Suffolk and Nassau Counties, N. Y., in the movement of charter parties, each of the carriers already was authorized to serve New York City. Questions relative to service under section 208(c) of the act arose in the proceeding, and, as pertinent here, Division 1 stated that:

> Obviously, there is no method of defining the incidental charter territory with mathematical precision. Rather, it requires an exercise of judgment which must be drawn from all the facts pertinent to the particular situation with due regard to the practical administration. In this connection we consider it to be fundamental that there should be some mutuality between the traffic being served by the pertinent regular-route service and that proposed to be served in the claimed incidental charter territory. Moreover, we believe boundaries which are well known generally should be used and consideration should be given to the character of the terrain and its occupancy, including distinctions between strictly urban communities and their suburban residential appendages.

It is further stated in that proceeding, however, with attention directed to the particular location:

> We have consistently recognized that the New York City area presents unique transportation problems,

and the issues raised herein are no exception. However, as seen none of the regular routes involved herein traverse any part of Long Island and the services rendered thereby are essentially with respect to passenger traffic moving in other directions. Accordingly, in these particular circumstances we find that the incidental charter rights of these carriers do not extend to points in Nassau and Suffolk Counties. While the same conclusion might appear to be warranted with respect to the remainder of Long Island; namely, as to Kings and Queens Counties, these areas differ somewhat in that they are boroughs of New York City, being municipal subdivisions thereof, and any delineation on that basis, with its attendant administrative and enforcement problems does not appear to be either feasible or otherwise justified.

As above noted, determination of this problem depends upon many different facts, including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved. In *Commercial Zones and Terminal Areas*, 54 M.C.C. 615, (Seventh Supplemental Report), it was decided that the findings in the same proceeding, 54 M.C.C. 22, (Sixth Supplemental Report), should be modified so as to make them inapplicable to the construction of certificates or permits issued to motor carriers of passengers or to the terminal areas of motor carriers of passengers. We see no reason to depart from the original test established in past proceedings, nor do we believe oral argument herein is necessary or desirable. Neither do we plan to institute an investigation looking toward the promulgation of a rule along the lines of the findings requested by defendant. We have consistently recognized that no rigid standard can be established by which to determine precisely the territory from which a

carrier possessing incidental charter rights could originate charter parties.

As stated, the extent of the Washington Commercial Zone is not relevant here. It is for this reason that the order of Division 5 dated September 10, 1953, in No. MC-108452 (Sub-No. 6), *Atwood's Transport Lines, Inc.—Interpretation of Charter Authority,* (not printed) is significant. There, in connection with defendant's petition for an interpretation of its rights, Division 5 ruled that Fort Meade, which is located in Maryland, only 12 miles from the nearest point on the District of Columbia line, could not properly be considered as a point within the territory served by defendant on its regular routes under the rules and regulations prescribed pursuant to Section 208(c) of the act. Defendant's very limited regular-route authority necessarily confines the originating points within the territory served to very narrow limits. Moreover, as here, Fort Meade is not located in the general vicinity of the direction taken by defendant's routes in Maryland and it is situated on or off-route to principal highways served by many passenger carriers.

Defendant presently performs very limited operations over only two regular routes, and those routes move in directly opposite directions from its terminal in Washington, with the one to the southeast through Maryland to Point Lookout, and the other to the northwest to Germantown. At no time do either of the routes approach any closer to Fort Belvoir than at the carrier's terminal in Washington. It is obvious then, that the military reservation under consideration is some 20 miles directly off any point on defendant's regular routes, and, in view of the direction of the carrier's routes, the traffic at Fort Belvoir would have no relation whatever to the service performed by the carrier over its regular routes. There would appear to be no mutuality whatever between the traffic which would be served in charter operations from Fort Belvoir and the traffic which is served every day by defendant over its

regular routes. Also, it is clear that defendant is of course required to traverse territory directly away from its regular routes for some 20 miles to Fort Belvoir in order to originate the traffic here under consideration. In addition to the lack of mutuality between the traffic being served by the pertinent regular-route service and that proposed to be served in the claimed incidental charter territory, the boundaries and the occupancy of the terrain, including the distinction between Washington and its suburban appendages are especially important here in view of defendant's limited operations. Defendant's regular-route operations have no connection with Virginia, and, consequently, with Washington's suburban appendages in Virginia. The situation in the Washington area is analogous to that found in the New York area in the *Hudson Transit Lines, Inc.*, case, *supra*. In reaching this conclusion, we have recognized, as did the examiner, that a number of well established motor passenger carriers serve Washington, some of which operate over U. S. Highway 1 which passes directly through the military reservation at Fort Belvoir. In view of these circumstances, we are unable to conclude that Fort Belvoir may be properly considered to be a point "within the territory" served by defendant's regular routes so as to enable the transportation of charter parties under section 208(c) of the act. All that has been said above with respect to Fort Belvoir, with the exception of distance from defendant's terminal and the character of traffic involved at that point, applies equally to Alexandria.

We find that the transportation by defendant of passengers from Alexandria and Fort Belvoir, Va., to points in the United States in the manner described herein does not constitute the transportation of special or chartered parties as that term is used in section 208(c) of the act, and that such transportation is and has been in violation of the rules and regulations prescribed by the Commission thereunder; that such transportation is and has been in violation of the provisions of section 206 of the act; and

that an order should be entered requiring defendant to cease and desist forthwith and thereafter to refrain and abstain from such operations unless and until appropriate authority therefor has been obtained.

An appropriate order will be entered.

COMMISSIONER WEBB, dissenting:

In section 208(c) of the Act, the Congress conferred upon motor common carriers of passengers the right to transport special or chartered parties to all points in the United States. This right was made subject "to such rules and regulations as the Commission shall have prescribed." As pertinent here, the Commission has provided that carriers may transport special or chartered parties "which originate at any point or points within the territory served by its regular route or routes." *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25.

The Commission's regulation is unknowable and its enforcement is necessarily random if the key phrase, "within the territory", is not defined with a modicum of precision. The majority's definition of "within the territory" is as follows:

> As above noted, determination of this problem depends upon many different facts, including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved.

It is impossible for any motor bus operator to know with reasonable certainty the "territory" beyond specifically authorized points of service from which chartered parties may be originated. One can well imagine the chaos and confusion that would result if the same regulation were made applicable to regular-route motor carriers of property. Some of those carriers authorized to serve Washing-

ton, D. C. would no longer have the right to serve Alexandria and Ft. Belvoir but others would.

One criterion employed by the majority is not authorized by the statute. Incidental charter rights are conferred by section 208(c) without proof of public convenience and necessity. That statutory purpose is defeated to the extent that consideration is given to "the operations of competing carriers and their ability to perform the service involved." The question of what points fall "within the territory" served by a carrier's regular routes is an economic and geographic question and not a question involving a need for charter service.

Admittedly, it would be difficult to prescribe with reasonable precision the territory from which carriers possessing incidental charter rights could originate charter parties. It does not seem more difficult, however, than the determination of what suburban appendages, as a matter of economic and geographic fact, are within the commercial zone of a base municipality. So far as motor carriers of property are concerned, both Alexandria and Ft. Belvoir have been found to be within the territory of Washington, D. C.

The Commission's duty to remove uncertainty is clear. Rights conferred by the Congress should not be vitiated by vague and uncertain criteria nor should the exercise of those rights be fraught with peril. Accordingly, I would institute an investigation looking toward the promulgation of a more definite rule and defer action in this proceeding during the pendency of the rule-making proceeding.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 11th day of July, A. D. 1961.

No. MC-C-2618

ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY

v.

ATWOOD'S TRANSPORT LINES, INC.

This proceeding being at issue upon complaint and answer on file, and having been duly submitted, and full investigation of the matters and things involved herein having been made, and the said Division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That defendant, Atwood's Transport Lines, Inc., be, and it is hereby, notified and required to cease and desist forthwith and thereafter to refrain and abstain from all operations, in interstate or foreign commerce, of the character found in said report to be unlawful, unless and until appropriate authority therefor is obtained.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as August 28, 1961.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

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No. 935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ATWOOD'S TRANSPORT LINES, INC., *Appellant*

v.

THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the District of Columbia

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MOTION BY ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY, DEFENDANT-INTERVENER, TO AFFIRM

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IN THE

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---

MOTION BY ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY, DEFENDANT-INTERVENER, TO AFFIRM

Comes now defendant-intervener, the Alexandria, Barcroft and Washington Transit Company, pursuant to the Revised Rules of the Supreme Court of the United States, and moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered October 11, 1962, by a specially-constituted District Court of three judges, convened pursuant to Section 2284, Title 28 of the United States Code dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission directing appellant to cease and desist from transporting charter parties from Fort Belvoir and Alexandria, Virginia.

None of the appellant's regular routes prescribed by the provisions of Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 207(a) serves any point or place in the Commonwealth of Virginia.

Section 208(c) of the Interstate Commerce Act, 49 U.S.C. 308(c), provides that a common carrier by motor vehicle transporting passengers under a certificate may transport in interstate or foreign commerce to any place, special or chartered parties under such rules and regulations as the Interstate Commerce Commission shall have prescribed. The Commission's order[1] of May 29, 1941 prescribed rules and regulations governing the transportation of special or chartered parties by common carriers by motor vehicle under Section 208(c) of the Interstate Commerce Act, 49 U.S.C. 308(c). Motor and rail carriers were represented individually and by their representative associations at the hearing from which the rules and regulations stemmed. The regulations, as promulgated by the Commission, declare in Rule III that a common carrier of passengers may transport charter parties which originate at any point or points on its regular route or routes or at any off-route point it may serve,

[1] Regulations Governing Special or Chartered Party Service, Ex Parte No. MC-29, 29 M.C.C. 25.

or which originate at any point or points within the territory served by its regular route or routes.

The proceeding before the Interstate Commerce Commission arose from a formal complaint by the Alexandria, Barcroft and Washington Transit Company charging that appellant was conducting unauthorized charter services from Fort Belvoir and Alexandria, Virginia, among other places. Appellant admitted the charges and contended that its incidental charter authority under the Commission's rules and regulations, supra, permitted the challenged services. The appellant's contention was rejected by the Commission. The three-judge District Court upheld the validity of the Commission's regulations and affirmed the Commission's decision that Fort Belvoir and Alexandria, Virginia are not within the scope of appellant's incidental charter authority.

ARGUMENT

Appellant's principal contention is that the Commission's promulgated rules and regulations are vague, uncertain and confusing governing the conduct of special and chartered party service within the permissive incidental authority conferred by Section 208(c) of the Interstate Commerce Act, 49 U.S.C. 308(c). Specifically, it contends that the Commission's reliance on a number of "factors or criteria" does not constitute a rational basis for the Commission's conclusion in defining the "origin territory" applicable to regulated interstate motor carriers accorded the right to conduct special and chartered party service. It is submitted that the contested rule meets the requirement of reasonable certainty; that it evolved from lengthy administrative proceedings before the Interstate Commerce

Commission in which all segments of the passenger motor carrier industry participated. Contrary to appellant's contention that the industry is concerned with the issues here involved, the administrative history before the Interstate Commerce Commission of the contested regulations denies the validity of the contention. The Commission, over a span of more than twenty years has not been confronted with a significant number of proceedings in which the application of Rule III of the *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, has been challenged; and in each instance the Commission's decision has been industry-wide accepted.[2]

The administration of the Interstate Commerce Act dealing with passenger motor carriers has demonstrated the propriety of the restrictive operations contemplated by the Statute and the National Transportation Policy declared by the Congress therein. The Commission carefully and deliberately excluded the applicability of its rules and regulations to motor common carriers of passengers in its docket titled, *Commercial Zones and Terminal Areas,* supplemental report, 64 M.C.C. 615. In *Lincoln Tunnel Applications,* 12 M.C.C. 184, at 197, the Commission noted that a need existed, in prescribing operating authority therein, to specify streets to prevent an operator to change its route at will and serve a territory which it had not previously served and in which another operator had developed traffic. Such unrestricted opera-

[2] Somerset Bus Company, Inc. v. Short Lines of Connecticut, Inc., 88 M.C.C. 201 (1961); Hudson Transit Lines, Inc.—Extension, Long Island, 76 M.C.C. 215 (1958); Starr Transit Co., Inc., Interpretation of Charter Authority, 74 M.C.C. 773 (1958); Wirth Extension—Points in Monroe County, New York, 78 M.C.C. 352 (1958).

tions would constitute unfair and destructive competitive practices and result in unstable and uncertain service to the public. Consistent therewith the Commission, in the matter of *Administrative Ruling* 102, No. MC-C-2077, 84 M.C.C. 581, in exempting the Washington, D. C. Commercial Zone from the application of its findings in MC-C-2077 declared that the Washington area is replete with numerous traffic density centers and military installations which, while located at short distances off of main arteries, are served directly by certain motor common carrierss of passengers. The authorized routes of such carriers constitute the very essence of their operations and an enlargement of their operating authorities by rule, would completely disrupt existing passenger carrier service. The standards outlined by the Commission in its Charter Regulations case, *supra*, have national application and offer reasonable and understandable guides for the determination of the origin territory for permissive passenger charter service. The rules were designed to accommodate varying situations throughout the United States. The motor carrier industry has not requested the Interstate Commerce Commission to amend or modify these regulations.

Appellant's contention that existing services are not to be considered, among other factors, in the determination of a carrier's "origin territory" is without merit. The evidence adduced before the Commission fully supports its conclusion, and the District Court so concluded. Alexandria and Fort Belvoir, Virginia are not points served by appellant's regular routes under its certificates of public convenience and necessity issued by the Interstate Commerce Commission. There is no need for further review of this issue. *Universal*